Business Records and the Fifth Amendment Right Against Self-Incrimination

The fifth amendment to the United States Constitution declares: "No person . . . shall be compelled in any Criminal Case to be a witness against himself . . . ." This constitutional *right*[1] against self-incrimination has suffered from an uncertainty of interpretation. One commentator has observed: "The [Supreme] Court has construed the clause as if its framers neither meant what they said nor said what they meant."[2]

This Note will examine the clause as it has been applied to business records. The scope of fifth amendment protection afforded business records is significant because of the importance of records to virtually any business, and because of the long-term trends of diminished protection for records, even while other aspects of the fifth amendment right have been expanded.[3] The early history of the common law and constitutional protections for oral testimony and writings, as well as established exceptions to the amendment's coverage for documents, will be surveyed first. Then two recent Supreme Court cases, *Fisher v. United States*[4] and *Andresen v. Maryland*,[5] each of which further significantly limits the fifth amendment protection of business records, will be discussed. Finally, various views of the fifth amendment and the current status of the law will be analyzed.

It is the thesis of this Note that the Supreme Court has ignored many important policy considerations, the words of the Constitution, and preconstitutional history in limiting the scope of the fifth amendment to only (1) compelled (2) testimonial communication that (3) incriminates, with each of these terms being narrowly defined. Because of the Court's restrictive interpretation, only minimal fifth amendment protection for business records remains.

1.

> Jurists and legal commentators invariably speak of the "privilege" against self-incrimination. I refer to it as a "right" because it is one, having the same status, constitutionally, as free speech, trial by jury, benefit of counsel, and other guarantees of the Bill of Rights. A privilege is a revocable concession granted by the government to its subjects. . . . To speak of the "privilege" against self-incrimination, degrades it, inadvertently or otherwise, in comparison to other constitutional rights.

L. LEVY, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS 265, 279 n.9 (1972).

2. *Id.* at 274. For instance, the right protects a person when his answers might have criminal *consequences*, whether or not in a criminal case. *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547, 652 (1892) (right held applicable to grand jury investigation).

3. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

4. 425 U.S. 391 (1976). For a discussion of Fisher v. United States, see section III.A. *infra*.

5. 427 U.S. 463 (1976). For a discussion of Andresen v. Maryland, see section III.B. *infra*.

I. EARLY HISTORY OF THE RIGHT[6] FOR BUSINESS RECORDS

A. *English Common Law*

The common law right against self-incrimination was established in England around 1650.[7] Although the right originally protected just against the compulsion of oral testimony, it was expanded during the early eighteenth century to also protect against the forced production of books, papers, and documents that might tend to be self-incriminating.[8] The right applied to "private" writings, but the English common law did not recognize a dichotomy between personal and business documents in defining "private."[9] A corporation's records were granted the same protection as an individual's personal records when they would tend to incriminate a defendant. Furthermore, the capacity of the person who was compelled to produce documents did not affect the protection afforded the documents. In *Rex v. Purnell*,[10] involving records of a university, the court rejected arguments advanced by the prosecution that the motion to produce the records "does not respect [Purnell] as defendant but as public officer"[11] and that "[t]he *university* is not accused; the university may therefore very safely produce their books."[12]

Thus, the English common law right against self-incrimination protected any arguably private documents. No prerequisites such as ownership, exclusive access and knowledge of the contents, or possession in a personal capacity were required in order to claim the right. Business records of an individual or an entity were immune from any compulsory production that might incriminate the possessor.

B. *Constitutional Protection for Documents*

The right against self-incrimination was part of the common law inheritance of the American colonies.[13] When the colonies broke from England, several states transformed the common law right into a constitutional right,[14] and this development continued on the national level with the adoption of the fifth amendment. The first Supreme Court case dealing with business records and the fifth amendment was the

6. For an exhaustive history, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968). For a concise summary, see L. LEVY, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS 265 (1972).

7. *E.g.*, Trial of Lilburne, *State Trials*, IV (1649); *see* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 312-13 (1968).

8. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 320, 390 (1968).

9. *See, e.g.*, Rex v. Worsenham, 91 Eng. Rep. 1370 (K.B. 1701).

10. 96 Eng. Rep. 20 (K.B. 1749), *same case differently reported* 95 Eng. Rep. 595.

11. 96 Eng. Rep. at 22.

12. *Id.* at 23 (emphasis in original).

13. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 333 (1968).

14. *Id.* at 405.

landmark case of *Boyd v. United States*,[15] decided in 1886. *Boyd* held that the federal right against self-incrimination protected business records. The case involved a civil forfeiture proceeding against two members of a family partnership for attempting to import glass without paying the duty. The government demanded that the partners produce a certain invoice from a previous importation. A statute provided that if a person did not produce an invoice, the government's allegations relating to the invoice would be taken as confessed. The partners produced the invoice, but protested that the statute was unconstitutional for compelling them to provide evidence to be used against them.[16]

The trial court admitted the evidence, and the jury found for the government. The Supreme Court reversed, holding the statute unconstitutional on fifth and fourth amendment grounds.[17] The Court considered the invoice to be within the category of "private books and papers"[18] protected by the fifth amendment notwithstanding its business nature and its connection with a partnership.[19] Throughout its opinion, the Court referred to the unconstitutionality of invading one's "indefeasible right of personal security, personal liberty and private property,"[20] and to how compelled production was an incident of despotic power unsuited to the legal traditions of both England and America.[21] In order to avoid the erosion of constitutional rights, provisions for protecting the security of people and property were held to require a liberal construction.[22] *Boyd's* broad protection for business records, however, did not endure. Since *Boyd*, the fifth amendment right against self-incrimination as it pertains to business records has been slowly but consistently eroded by a series of exceptions.

II. Established Exceptions to the Right

A. *Corporations*

The Supreme Court's 1906 decision in *Hale v. Henkel*[23] marked the start of a trend severely limiting fifth amendment protection for business records by denying the right against self incrimination to corporations. Hale, secretary and treasurer of a corporation, had received a subpoena duces tecum commanding him to produce certain agree-

15. 116 U.S. 616 (1886).

16. *Id.* at 617-18.

17. *Id.* at 633-35, 638.

18. *Id.* at 634.

19. In addition, the Court held that the results of the forfeiture proceedings were basically criminal so the amendment's protection applied. *Id.* The Court also held that the claimant could rely on the amendment even though it was technically a proceeding in rem. *Id.* at 638.

20. *Id.* at 630.

21. *Id.* at 631-32.

22. *Id.* at 635.

23. 201 U.S. 43 (1906).

ments, correspondence, and reports of the corporation for a grand jury investigating violations of the Sherman Act. He declined to do so and was found in contempt of court. On direct appeal the Supreme Court affirmed a denial of habeas corpus.

Under the circumstances, Hale lacked a personal right against self-incrimination because of an immunity statute.[24] The Court held the fifth amendment right to be purely personal and thus unavailable to an agent when the principal, whether an individual or a corporation, might be incriminated.[25] The Court felt that otherwise many valid cases would fail because they could be proved only from the corporate papers. Although a corporation is "an association of individuals," and "[i]n organizing itself as a collective body it waives no constitutional immunities *appropriate* to such body,"[26] its rights were held not to include the right against self-incrimination.

In *Hale*, the Court offered little guidance as to what it considered "appropriate" constitutional rights for corporations. Apparently the fifth amendment right against self-incrimination was inappropriate because it is a *personal* right, and a corporation must act through its agents rather than personally. Although one might reasonably argue that the records of a large corporation are not "private books and papers" such as those protected in *Boyd*, this case foreshadowed the weakening of constitutional protections for more private documents, as well.

The issue not resolved in *Hale*—whether, absent an immunity statute, a corporate officer could refuse to produce corporate documents on the ground that the officer might be personally incriminated—was answered in the negative in *Wilson v. United States*.[27] A grand jury had issued a subpoena duces tecum to a corporation to produce copies of letters and telegrams signed by its president. The subpoena was served on Wilson as president when he was already under indictment for fraudulent use of the mails and conspiracy. Wilson refused to produce the copies because he believed they would tend to incriminate him, and the trial court found him in contempt. The Supreme Court rejected Wilson's fifth amendment argument and affirmed the contempt conviction. It contrasted the private books and papers of the partnership protected in *Boyd* with the corporate books involved in *Wilson*. Neither authorship nor possession affected the result because the documents involved were not *private* papers. By assuming custody of them, an officer was deemed to accept the obligation to permit inspection. The

24. Immunity statutes require one to testify in exchange for a certain degree of immunity from prosecution for crimes relating to the testimony. Because the statutes render the testimony non-incriminating, they have been upheld against fifth amendment attacks. *See* Kastigar v. United States, 406 U.S. 441 (1972); Brown v. Walker, 161 U.S. 591 (1896).

25. 201 U.S. at 69-70.

26. *Id.* at 76 (emphasis added).

27. 221 U.S. 361 (1911).

principle applied both to public documents in public offices and to records required by law to be kept. Although the Court acknowledged that early English cases were to the contrary, it declined to follow them, noting that they could not be deemed controlling. Associating with a corporation thus included, in certain circumstances, the price of relinquishing one's right not to incriminate oneself. Later, other activities would similarly lead to a lessening of the fifth amendment's protection.[28]

Two years after *Wilson* the Court extended that case's impact in *Grant v. United States.*[29] While *Wilson* had involved a large corporation, the corporation in *Grant* had only one stockholder. The Court summarily discounted this distinction and held the right automatically inapplicable to both the corporation and its stockholder because "corporate records and documents"[30] were involved. *Grant*, more so than *Wilson*, brings into focus a difficulty with making the fifth amendment inapplicable to corporations. Despite the legal status of corporations as entities, *people* are nevertheless involved, so the constitutional rights of the people connected with the corporation are necessarily implicated. After *Boyd* and *Grant* a partnership—by definition involving more than one person—was, inconsistently, considered to have protected "private papers," whereas an incorporated sole proprietorship had to forego that protection as a cost of incorporating. As will be seen, later cases resolved the inconsistency by further restricting the fifth amendment protection for business records.

B. *Unincorporated Associations*

The *Hale* and *Wilson* decisions were extended from the corporate sphere to that of the unincorporated association in *United States v. White.*[31] A labor union had received a subpoena duces tecum to produce its constitution, bylaws, and certain other union records. White, the "assistant supervisor" of the union, refused to produce the documents on the grounds that they might incriminate the union or himself, as an officer or individually. White was found in contempt and the Supreme Court affirmed, holding that the right against self-incrimination applied only to natural individuals and not to organizations such as corporations. Furthermore, the Court held that representatives of such a collective group were not entitled to their purely personal rights when acting as representatives for the group. *Boyd*, said the Court, had indicated that documents must be the private property of the person claiming the right, or at least in his possession in a purely personal capacity, to be protected. The Court reasoned that the government's historic

28. *See* text accompanying notes 91-102 *infra.*

29. 227 U.S. 74 (1913).

30. *Id.* at 80.

31. 322 U.S. 694 (1944).

regulatory power over corporations was a convenient rationale for denying them and their officers the right, but that the absence of such power would not preclude a denial of the fifth amendment right. Rather,

> the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.
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> It follows that labor unions, as well as their officers and agents acting in their official capacity, cannot invoke this personal privilege.[32]

Thus, the scope of the fifth amendment was further narrowed by excluding from protected "personal records" not only all corporate documents, but also the documents of most[33] unincorporated groups. It seemed that merely by associating with others, one forfeited a constitutional right.

After *Boyd*, the Supreme Court did not reconsider the status of partnership records with respect to the fifth amendment right against self-incrimination until 1974, in *Bellis v. United States*.[34] *Bellis* involved the financial records of a dissolved three-partner law firm.[35] A subpoena was served on Bellis, then in possession of the records. He asserted his right against self-incrimination to refuse production, and was held in contempt. In line with its limited view of the fifth amendment right in *White*, the Supreme Court affirmed. The Court noted that the small partnership had an independent institutional identity, and that Bellis therefore held the records in a representative capacity. The Court observed that *Grant* had demonstrated that the right did not necessarily exist merely because an organization was small. In addition, many professions included both corporations and partnerships, and "the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise."[36] Although the Court indicated the result might be different for a small family partnership or other pre-existing relationship of confidentiality, the fifth amendment right against self-incrimination had suffered another significant limitation.

C. *Bankruptcy*

A bankrupt retains his right against self-incrimination to the ex-

32. *Id.* at 700-01.

33. Although the court left open the possibility that the right might still apply to organizations sufficiently representing private or personal interests rather than group interests, id. at 701-02, this proviso was not applied in later cases. *See* 3 HOFSTRA L. REV. 467, 477-78 (1975).

34. 417 U.S. 85 (1974).

35. The dissolution did not affect the analysis or result. *Id.* at 96 n.3.

36. *Id.* at 101. This remark becomes more significant when the Court in later cases substantially limits the right for sole proprietorships.

tent that he need not testify orally,[37] or personally produce his business records in court,[38] when such actions would serve to incriminate him. However, the workings of the bankruptcy proceeding limit the protection afforded by the fifth amendment.[39]

In bankruptcy, title to the bankrupt's property passes to a third party, the trustee. After the change in ownership, the bankrupt's personal right no longer protects his former records. In *Johnson v. United States*[40] the defendant was convicted of concealing money from his trustee in bankruptcy. Johnson objected that his books, introduced by the trustee, had been improperly admitted in evidence against him, but the Supreme Court affirmed the conviction. It succinctly held that "[a] party is privileged from producing [incriminating] evidence but not from its production [by another]."[41] Furthermore, the Court said that a person cannot protect his property from being used to pay his debts by attaching a disclosure of a crime to it, then relying on the fifth amendment to refuse to relinquish possession. The Court upheld the compulsion involved because its purpose was the distribution of the bankrupt's property, rather than the collection of criminal evidence against him.

In a later bankruptcy case the Court explained that the constitutional right is procedural and does not affect the substantive obligation to surrender something when another has the property right.[42] Commentators have been predictably critical of allowing a technical property concept to destroy a constitutional right.[43] Even a sole proprietor may, in effect, lose his right against self-incrimination relating to his business records if he is adjudged bankrupt. This exception is even more objectionable than the exceptions for associating with an organization, because bankruptcy may be wholly involuntary. The trustee's property right and the bankrupt's constitutional right could both be upheld by requiring the transfer, and granting the bankrupt immunity from the use of the information against him.[44]

D. *Required Records*

The historical required records exception provides that one must keep and produce records required by law, even though they may be self-incriminating, and with no grant of immunity from their use in a criminal prosecution. It is another broad, if rather uncertain, exception to the fifth amendment right against self-incrimination.

37. McCarthy v. Arndstein, 266 U.S. 34, 39-40 (1924).

38. *See* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 145 (1959).

39. *Id.*

40. 228 U.S. 457 (1913).

41. *Id.* at 458.

42. McCarthy v. Arndstein, 266 U.S. 34, 41 (1924).

43. *See, e.g.*, L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 145 (1959).

44. For a fuller discussion of the concept see note 24 *supra* and the text accompanying notes 132-33 *infra*.

The leading case, *Shapiro v. United States*,[45] extended the doctrine in 1948 beyond records specifically required by law that had not been kept previously (such as a pharmacist's records of prescription drugs) to encompass ordinary business records.[46] Shapiro was served with a subpoena duces tecum by authority of the Emergency Price Control Act of 1942, under which regulations required a person to "keep and make available for examination . . . records of the same kind as he has customarily kept, relating to the prices which he charges . . . ."[47] Shapiro produced the records, but asserted that he was protected from their use against him by his right against self-incrimination. This assertion was rejected, and he was convicted of violating the Act on the evidence provided by the records. The Supreme Court affirmed, relying in part on language in the *Wilson* case that spoke of denying the fifth amendment protection to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation . . . ."[48] Furthermore, the Supreme Court thought it would be incongruous for records of an individual to be treated differently from records of a corporation. The latter rationale ignores the distinction that was decisive in *Wilson*,[49] as well as the policies and plain language of the fifth amendment.

The Court narrowed the *Shapiro* holding in a trilogy of cases decided in 1968.[50] It read *Shapiro* as requiring three prerequisites: (1) an essentially regulatory (*i.e.*, non-criminal) inquiry; (2) records of a kind the regulated party had customarily kept; and (3) records that had assumed "public aspects" making them analogous to public documents.[51] Applying the *Shapiro* standard, the Court held that individuals could not be required to register or pay the occupational tax of the federal wagering tax statutes,[52] nor to register a regulated firearm,[53] because of their fifth amendment right against self-incrim-

45. 335 U.S. 1 (1948).

46. L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 46 (1959).

47. Section 14(b) of Maximum Price Regulation 426, 8 Fed. Reg. 9546, 9549 (1943), *quoted at* 335 U.S. at 5.

48. 335 U.S. at 17 (quoting Wilson v. United States, 221 U.S 361, 380 (1911)) (emphasis of entire quotation, added by *Shapiro*, omitted). When the federal government can regulate how much wheat a person can grow for use on his own farm, Wickard v. Filburn, 317 U.S. 111 (1942), what escapes being an "appropriate subject" for its regulation? If any such subjects exist, no doubt most of them can be reached by state or local governments.

49. The *Wilson* holding was based on the fact that corporate records were involved, and it mentioned the required records doctrine only by way of illustration. *See* Shapiro v. United States, 335 U.S. 1, 56-66 (1948) (Frankfurter, J., dissenting).

50. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

51. Grosso v. United States, 390 U.S. 62, 67-68 (1968).

52. Marchetti v. United States, 390 U.S. 39 (1968) (not records customarily kept; no "public aspects" to records); Grosso v. United States, 390 U.S. 62 (1968) (statute directed at individuals inherently suspected of criminal activities).

53. Haynes v. United States, 390 U.S. 85 (1968).

ination. It should be noted that these cases are distinguishable from the typical business records cases involving white collar crime and statutes that are more regulatory than criminal. Thus, *Shapiro* is still viable in many situations involving business records.[54]

The required records doctrine further limits the constitutional protection of business records of a sole proprietor. The government need only choose to regulate a field, and do so in a way that conforms to the Supreme Court's three standards, for the fifth amendment protection of business records to evaporate.

E. *Instrumentalities, Fruits, and Contraband*

A final established exception to the fifth amendment's protection of business records is related to the fourth amendment and the now overruled "mere evidence" rule.[55] In 1921, *Gouled v. United States*[56] established the rule that merely evidentiary material could not be seized under a search warrant or incident to arrest, while instrumentalities and means by which a crime was committed, fruits of crime, and contraband could be seized. This dichotomy was based on the premise, long observed as a fiction,[57] that the government must have a property interest in material before it could be seized. Apparently, this property interest also obviated fifth amendment objections to the material's use against a defendant after the seizure. *Gouled* specifically noted that "[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure . . . ."[58] and inadmissible in evidence. Subsequently, the categories of seizable material were interpreted broadly while the rule remained intact.[59] Thus, business records could be used against a defendant notwithstanding the fifth amendment if a court was able to call them instrumentalities, fruits, or contraband.

In 1967, the Supreme Court rejected the mere evidence rule in *Warden v. Hayden*.[60] It held the clothing that had been seized in that

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54. Some lower federal courts have extended the required records doctrine to the tax field, *e.g.*, Falsone v. United States, 205 F.2d 734, 739 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953), where its potential sweep is even more tremendous than in the business regulatory field. *See* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 147 (1959). Lately, however, the Department of Justice has refrained from invoking the doctrine in the tax field. *See* Stuart v. United States, 416 F.2d 459, 462 n.2 (5th Cir. 1969).

55. The "mere evidence" distinction was abandoned by the Supreme Court in Warden v. Hayden, 387 U.S. 294 (1967).

56. 255 U.S. 298 (1921).

57. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 306 & n.11 (1967).

58. 255 U.S. at 309.

59. Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 LOYOLA L.A.L. REV. 274, 280-81 (1973); *see* reasoning in Marron v. United States, 275 U.S. 192, 199 (1927) (ledger and utility bills admitted).

60. 387 U.S. 294 (1967).

case admissible over fifth amendment objections because it was not "testimonial" or "communicative."[61] The Court reserved the question "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."[62] If such items could not be seized under the fourth amendment, then fifth amendment issues concerning them would never have occasion to arise. The extent to which business records might be protected under this new standard was unsettled before *Andresen v. Maryland*.[63]

III. Recent Cases Further Limiting the Right Against Self-Incrimination for Business Records

A. *Fisher v. United States*

The recent case of *Fisher v. United States*[64] provides another example of the diminution of the fifth amendment right against self-incrimination as it pertains to business records. Three sole proprietors running three separate businesses were each interviewed by an Internal Revenue agent concerning possible civil or criminal income tax liability. The taxpayers soon obtained documents from their accountants and transferred the documents to their lawyers who had been retained in connection with the investigation. The I.R.S. served a summons on one lawyer to produce the accountant's workpapers, copies of tax returns, and copies of reports and other correspondence between the accounting firm and the taxpayer. The other lawyer was similarly ordered to produce the accountant's analysis of the taxpayer's income and expenses which had been copied by the accountant from the taxpayer's cancelled checks and deposit receipts. Both lawyers declined to comply, and in each case the summons was ordered enforced by the district court. One court of appeals affirmed while the other reversed.[65]

The Supreme Court initially decided that the taxpayer's fifth amendment right would not excuse the lawyer from producing the documents. Nevertheless, the common law attorney-client privilege would excuse the production *if* the papers were unobtainable by summons from the client. The major issue then became "whether the documents could have been obtained by summons addressed to the taxpayer while the documents were in his possession."[66] The Court's answer was "yes."

61. *See* section IV.B.2. *infra.*

62. 387 U.S. at 303.

63. 427 U.S. 463 (1976). *See* section III.B. *infra.*

64. 425 U.S. 391 (1976).

65. United States v. Fisher, 500 F.2d 683 (3d Cir. 1974) (affirming); United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974) (reversing).

66. 425 U.S. at 405.

The Supreme Court interpreted the fifth amendment's protection as applicable only when a person is (1) *compelled* to make a (2) *testimonial* communication[67] that is (3) *incriminating.* If any one of the three elements is lacking, the right is unavailable. In these cases substantial compulsion was present, since the Court framed the issue as if the taxpayers had possession, but the other two prerequisites to the right were not.[68] The Court indicated that the result might be different if the taxpayer's own tax records, rather than accountants' workpapers, were involved because the former might be "private papers" protected under the rule in *Boyd.* The Court's language could also be read as implying the result might not be different.[69]

Justice Brennan used a different analysis in his concurring opinion. He agreed with the ultimate judgment, but feared that the majority's opinion portended a crippling of the fifth amendment's protection of private books and papers. Rather than making a three-element analysis as the majority had, he concentrated on the privacy principles which he felt the amendment historically had protected.[70] Justice Marshall concurred in the judgment for the reasons stated by Justice Brennan.[71] However, because he felt the outcome of cases with the majority's approach would be much the same as with the approach used in earlier cases, he was less pessimistic about the change than Brennan was.

B. *Andresen v. Maryland*

Another recent case, *Andresen v. Maryland,*[72] complements *Fisher* by dealing with the element of "compulsion" that was not fully discussed in *Fisher.* The issue in *Andresen* was whether a search warrant could be used to reach business records immune from subpoena because of the fifth amendment.

Andresen was a lawyer working as a sole practitioner. A government investigation discovered that he had defrauded a client purchasing land by concealing the existence of two outstanding liens. When the client learned of the liens, Andresen issued a title policy guaranteeing clear title. That action defrauded the insurance company by requiring it to pay the outstanding liens. The investigators concluded there was probable cause to believe Andresen had

67. The Court has never defined this term precisely. In general, the Court uses it to mean any activity performed for the purpose of communicating. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 264-65 (2d ed. E. Cleary 1972).

68. For a discussion of each of the three elements see section IV.B.1 (compulsion), section IV.B.2 (testimonial communication), and section IV.B.3 (incrimination) *infra.*

69. 425 U.S. at 415 (Brennan, J., concurring in the judgment). *See* note 99 *infra.*

70. See text accompanying notes 151-55 *infra* for a fuller discussion of Brennan's opinion in *Fisher.*

71. 425 U.S. at 434 (Marshall, J., concurring in the judgment).

72. 427 U.S. 463 (1976).

committed the state crime of false pretenses and obtained a warrant to search his law office. Twenty-eight items were seized.

Andresen was charged with multiple counts of false pretenses and fraudulent misappropriation by a fiduciary. Five items seized from the law office were admitted over fifth and fourth amendment objections. They included documents related to the sale and liens, and memoranda written in Andresen's handwriting. A jury found Andresen guilty of eight counts. Four were reversed on appeal on state law grounds, with the appellate court upholding the trial court on the constitutional issues.

The Supreme Court affirmed the convictions.[73] It acknowledged that the seized business records were incriminating, and that some contained statements made by Andresen—*his* testimonial communication. In the majority's view, however, the sole fifth amendment issue was whether the seizure of the business records and their admission into evidence "compelled" the defendant to testify against himself. It concluded that he had not been so compelled.

This time, Justice Brennan vigorously dissented.[74] As in *Fisher*, he analyzed the case in terms of privacy rather than the three-element analysis of the majority. Arguing from policy and precedent, he urged that these records should be protected.[75]

Fisher and *Andresen* are the most recent cases in a long line of Supreme Court decisions defining the scope of the fifth amendment right against self-incrimination. For this reason, the various opinions in the newer cases are analyzed in the following section, where they may best be placed in historical perspective. Many cases not involving business records will be considered in order to clearly establish the decisional trends.

IV. VIEWS OF THE FIFTH AMENDMENT

A. *Introduction*

The fifth amendment right against self-incrimination has been hailed as "one of the great landmarks in man's struggle to make himself civilized."[76] Despite this recognition of its importance, it has not been consistently interpreted. Justice John Harlan, contrasting the disparate majority approaches in several cases, once concluded:

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73. Id. at 484. On the fourth amendment issue, the Court held that the warrant was not impermissibly general.

74. Justice Marshall, who wrote the other concurring opinion in *Fisher*, also dissented. His dissent, however, was based on fourth amendment grounds, and he did not reach or discuss the fifth amendment issue. 427 U.S. at 493-94 (Marshall, J., dissenting).

75. For a fuller discussion of Brennan's opinion in *Andresen*, see text accompanying notes 157-59 *infra*.

76. E. GRISWOLD, THE 5TH AMENDMENT TODAY 7 (1955), *quoted in* Ullman v. United States, 350 U.S. 422, 426 (1956), *and* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

"I perceive in these cases the essential tension that springs from the uncertain mandate which this provision of the Constitution gives to this Court."[77] Numerous policies have been advanced to help in interpreting the right;[78] *Wigmore* lists twelve.[79] Due to the abundance of policies, courts often select an isolated "straw man" policy, show how a particular application of the right would not advance this chosen policy, and then conclude that the right should not apply.[80]

Two main views of the fifth amendment have prevailed over the years.[81] Those holding the narrow view, based on an interpretation of the literal words of the amendment, feel that the amendment was only meant to protect against compelled testimonial incrimination. Those supporting the broad view, based on the common law prior to the amendment's adoption, contend that the amendment is designed to protect privacy.[82]

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77. California v. Byers, 402 U.S. 424, 450 (1971) (Harlan, J., concurring).

78. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

79. (1) It protects the innocent defendant from convicting himself by a bad performance on the witness stand.
(2) It avoids burdening the courts with false testimony.
(3) It encourages third-party witnesses to appear and testify by removing the fear that they might be compelled to incriminate themselves.
(4) The privilege is a recognition of the practical limits of governmental power; truthful self-incriminating answers cannot be compelled, so why try.
(5) The privilege prevents procedures of the kinds used by the infamous courts of Star Chamber, High Commission and Inquisition.
(6) It is justified by history, whose test it has stood; the tradition which it has created is a satisfactory one.
(7) The privilege preserves respect for the legal process by avoiding situations which are likely to degenerate into undignified, uncivilized, and regrettable scenes.
(8) It spurs the prosecutor to do a complete and competent independent investigation.
(9) The privilege aids in the frustration of "bad laws" and "bad procedures," especially in the area of political and religious belief.
(10) The privilege, together with the requirement of probable cause prior to prosecution, protects the individual from being prosecuted for crimes of insufficient notoriety or seriousness to be of real concern to society.
(11) The privilege prevents torture and other inhumane treatment of a human being.
(12) The privilege contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.

8 WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961) (citations, footnotes, and explanations omitted).

80. *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 56-57 n.5 (1964) (warning against the practice).

81. The case of Brown v. Walker, 161 U.S. 591 (1896), upholding a statute requiring a person to testify if granted immunity, split the Supreme Court along doctrinal lines almost the same way it is split today. The *Brown* majority upheld the compulsion of testimony when it could no longer be incriminating just as the *Fisher* majority upheld the compelled production of documents when the act of producing them was not incriminating. Similarly, a *Brown* dissenter felt the amendment was for the "peace and security of the citizen," *id.* at 631 (Field, J., dissenting), a position similar to Justice Brennan's privacy argument advanced in his concurring opinion in *Fisher* and dissenting opinion in *Andresen.*

82. For a more philosophical approach, see Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

B. *The Narrow View*

Because the narrow view of the fifth amendment commands a majority of the United States Supreme Court today in cases concerning business records, it will be profitable to examine it in detail. This viewpoint requires a (1) compelled (2) testimonial communication that is (3) incriminating, to invoke the protection of the amendment.

1. *Compulsion*

The Supreme Court has often interpreted the "compulsion" forbidden by the fifth amendment to include indirect compulsion, such as statutes imposing a penalty on one's assertion of his fifth amendment right. *Boyd v. United States*[83] involved a forfeiture statute that provided that if a person did not produce his business records, the prosecutor's allegations relating to the records would be taken as true. The Court easily found the statute unconstitutional on fifth (and fourth) amendment grounds.

This trend has continued in recent years.[84] For instance, *Garrity v. New Jersey*[85] concerned an investigation of police officers for ticket fixing. Pursuant to a state statute, they were warned that anything they said could be used against them, that they had the right to remain silent, but that if they refused to answer they could be dismissed from their jobs. They answered questions, and their answers were used to convict them. The Supreme Court reversed because the statements were "infected [with] coercion"[86] rather than a "free and rational choice,"[87] and because the right against self-incrimination was among those "rights of constitutional stature whose exercise a State may not condition by the exaction of a price."[88] Another case extended the *Garrity* reasoning to a threat of loss of public contracts for five years,[89] an arguably lesser penalty.[90] The Supreme Court has consistently interpreted "compulsion" as including the compulsion of a choice between not remaining silent and suffering an economic loss.

In *Couch v. United States*,[91] however, the Supreme Court upheld

83. 116 U.S. 616 (1886). For a discussion of *Boyd*, see text accompanying notes 15-22, *supra*.

84. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

85. 385 U.S. 493 (1967).

86. *Id.* at 497.

87. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 464-65 (1966)).

88. 385 U.S. at 500.

89. Lefkowitz v. Turley, 414 U.S. 70 (1973).

90. *Id.* at 83.

91. 409 U.S. 322 (1973).

another sort of indirect compulsion, that of restrictions on what a person could do with her business records and still retain her fifth amendment right concerning them. The taxpayer, a sole proprietor of a restaurant, had regularly turned her business records over to an accountant for the preparation of her income tax returns. The Internal Revenue Service began investigating her tax returns and issued a summons to the accountant to produce Couch's business records. The taxpayer intervened, asserting that her ownership of the records created a fifth amendment right to bar their production. The Supreme Court disagreed and upheld the summons. The Court stated that only the accountant, not the taxpayer, was compelled to do anything, because compulsion was lacking when there was ownership without possession. In addition, the Court recognized little expectation of privacy when much of the information would be disclosed on a tax return. To recognize the fifth amendment right here, said the Court, would "interfere with the legitimate interest of society in enforcement of its laws and collection of the revenues."[92]

The precise compulsion issue involved in *Andresen v. Maryland*[93]—whether a search warrant could be used to reach business records immune from subpoena because of the fifth amendment—could not have arisen before 1967 when the Court rejected the mere evidence rule in *Warden v. Hayden*.[94] Several courts of appeals subsequently held that the demise of the mere evidence rule allowed the seizure of evidentiary documents by search warrant whose production could not be compelled by subpoena.[95]

The leading case supporting the opposite view was the Seventh Circuit case of *Hill v. Philpott*.[96] In *Hill* the Internal Revenue Service had seized thirty-five cartons of financial and patient records from a doctor's home and office pursuant to a search warrant. The district

92. *Id.* at 336. Justice Douglas, in his dissenting opinion, *id.* at 338, compared this case to those cases that had found indirect compulsion sufficient to invoke the right. He contended that the complexity of the tax laws required professional assistance, so that the majority attached a penalty to the right against self-incrimination by forcing a taxpayer to forego such assistance. Justice Douglas interpreted the majority's suggestion that the result might be different if the accountant had been Couch's employee, 409 U.S. at 334 n.18, as in effect saying, "because her business did not call for, or because she could not afford, a full-time accountant, [she] deserves less protection under the Fifth Amendment than a taxpayer more fortunately situated." *Id.* at 342 n.4 (Douglas, J., dissenting). Thus, a direct penalty for exercising one's fifth amendment right violates the right but a significant de facto penalty does not.

93. 427 U.S. 463 (1976).

94. 387 U.S. 294 (1967). For a discussion of *Hayden*, see text accompanying notes 60-62 *supra*.

95. *See* cases cited in Andresen v. Maryland, 427 U.S. 463, 470 n.5 (1976). For instance, in United States v. Bennett, 409 F.2d 888, *cert. denied*, 396 U.S. 852 (1969) *and* 402 U.S. 984 (1971), the Second Circuit found that there was no distinction for constitutional purposes between the seizure of a letter that was evidence of a conspiracy in that case, and the seizure of the clothing in *Hayden*. Similarly, in United States v. Blank, 459 F.2d 383, *cert. denied*, 409 U.S. 887 (1972), the Sixth Circuit denied there was compulsion in the use of a search warrant to obtain the records of an illegal gambling business.

96. 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

court upheld that action, but the court of appeals reversed. It felt the distinction between obtaining papers by search warrant and obtaining them by subpoena was more shadow than substance. A search warrant still compelled a defendant to testify because the jury knew the books and records were his, even though another person might authenticate them. In the realities of trial, "the entries he has made . . . speak against him as clearly as his own voice."[97] The court of appeals acknowledged that the fifth amendment made criminal prosecutions more difficult, but noted that this was its clear intent.

In *Andresen*, however, the Supreme Court adopted the view that a search warrant does not involve compulsion. The Court relied on *Fisher* and *Couch v. United States*[98] in its analysis. It interpreted *Fisher* as holding that a lawyer's production of his "client's tax records"[99] did not violate the taxpayer's fifth amendment right because the taxpayer was not compelled to do anything. *Couch* involved a similar holding[100] for records in the hands of an accountant. The *Andresen* case likewise lacked compulsion, according to the Court, because the defendant was not asked to say or do anything—he made the records voluntarily, law enforcement personnel conducted the search and seizure, and a handwriting expert authenticated the records at trial. Thus, even when a subpoena would violate the fifth amendment by compelling a person to testimonially indicate the existence, possession, or authenticity of documents, a valid seizure by law enforcement officials may reach the same documents.

In addition, the Court argued in *Andresen* that the seizure of business records during a lawful search would not undermine any of the policies of the amendment. The Court noted that the defendant was not subjected to the cruel trilemma of self-accusation, perjury, or contempt, that there was no greater danger of inhumane treatment than with any other search, and that the statements were trustworthy because they were already in existence. This analysis can be criticized on two grounds. First, the "trustworthy" rationale, while accurate for Andresen because he did not know the outcome of his case in advance, will become inaccurate for potential defendants relying on that case in the future. Someone in Andresen's position now knows it ultimately may be advantageous to plant inaccurate material in his files. This action could lead to the use of fabricated evidence at trials. Second, the anal-

97. *Id.* at 149.

98. 409 U.S. 322 (1973). For a discussion of *Couch*, see notes 91 and 92 *supra*, and accompanying text.

99. 427 U.S. at 472. Note that *Fisher* basically involved accountant's workpapers, 425 U.S. at 394, and the Court distinguished the documents in that case from the taxpayer's "own tax records," *id.* at 414, suggesting the outcome might be different with the latter. *Andresen* blurred this distinction, as Justice Brennan had predicted in his opinion in *Fisher*. *Id.* at 415 (Brennan, J., concurring in the judgment).

100. 409 U.S. at 323.

ysis is an example of the Court using "straw man" policies to emasculate the amendment. The Court in *Andresen* quoted without discussion a list of additional policies it had set forth earlier as being reflected in the amendment's protection. These included: "a fair state-individual balance . . .; our respect . . . of the right of each individual to a private enclave where he may lead a private life . . .; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent."[101] In particular, the Court's decision in *Andresen* denies to the sole proprietor even the small "private enclave" of his own handwritten notes in his own files.[102] This holding amounts to putting a de facto penalty on writing down one's thoughts on paper where they can be seized, rather than keeping a mental note that is protected by the fifth amendment.

The Supreme Court has consistently struck down statutes compelling someone to forfeit his fifth amendment right or else suffer an economic loss. It has, however, upheld compulsion generated by the circumstances of business necessity, such as the complexity of the tax laws requiring professional assistance in *Couch*, and the need to keep business records on paper rather than mentally in *Andresen*. Nothing in the language or policies of the amendment supports this distinction. Both situations are indirect forms of compulsion in that a person is never directly compelled to waive his fifth amendment right, but instead must choose between his right and the economic loss or demands of business necessity.

If anything, the policies behind the amendment are stronger when the compulsion results from circumstances rather than from a statute. In situations involving statutory penalties, one is not in danger of inadvertently forfeiting his fifth amendment right, since the need to choose between the right and the penalty would be clearly presented. Once confronted with the choice, a person is in a position to rationally weigh the alternatives. Conversely, in cases of compulsion by circumstances, one may lose one's fifth amendment right unknowingly. It is highly unlikely that Andresen considered the potential loss of his constitutional right when he decided to commit his thoughts to paper. Had he considered that factor, he would have been forced to make a decision based on incomplete data, since he had no way of knowing when the government might choose to seize his records. This constant uncertainty more seriously impinges upon a "zone of physical freedom" than

101. 427 U.S. at 476 n.8 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

102. Justice Brennan, in his *Andresen* dissent, contended that a search and seizure involves compulsion just as a subpoena does, because a person is not free to resist government authority. Even when the person is not present, his door indicates symbolic resistance. A person is compelled, according to Justice Brennan, if the government denies him "a zone of physical freedom necessary for conducting [his] affairs." 427 U.S. at 487 (Brennan, J., dissenting). Justice Brennan's definition of compulsion is satisfied whenever a search and seizure intrudes on this zone of privacy.

does a confrontation presenting a clear choice. The Court's disregard of compulsion by circumstances as a genuine form of compulsion proscribed by the fifth amendment is unjustified.

2. *Testimonial Communication*

The exclusion from the fifth amendment's protection of nontestimonial evidence began in 1910, and has since continually expanded. In *Holt v. United States*,[103] a defendant was found guilty of murder after he had been compelled to put on a blouse to determine whether it fit him. The Supreme Court felt that barring this evidence would be "an extravagant extension of the Fifth Amendment,"[104] and contrasted the use of a defendant's body as evidence with the extortion of communications from him by physical or psychological compulsion.

Schmerber v. California[105] relied on this reasoning in upholding the withdrawal of a blood sample and the use of a chemical analysis of its alcohol content in evidence. The Court followed *Holt* but added several cautionary limitations. First, the Court reiterated that the right protects communication in any form, including compliance with a subpoena to produce one's papers. Second, it warned that the distinction between testimonial and nontestimonial evidence may break down in some cases, as with a lie detector test measuring bodily changes but obtaining responses that are essentially testimonial.

A pair of 1967 Supreme Court cases, *United States v. Wade*[106] and *Gilbert v. California*,[107] extended the "nontestimonial" exclusion by upholding requirements that a defendant speak in a lineup and give a handwriting exemplar. Both the voice and the handwriting were considered mere identifying physical characteristics. As Justice Marshall later pointed out,[108] these two cases were not direct extensions of *Schmerber* and *Holt*, which had only required the defendants to passively submit. *Wade* and *Gilbert* required their active cooperation, a much more serious interference with an individual's personality.

In *California v. Byers*,[109] a four-man plurality of the Supreme Court further limited the definition of "testimonial" in upholding a California statute requiring the driver of a motor vehicle involved in an accident to stop at the scene and to give his name and address. Stopping, the plurality said, was not testimonial any more than giving handwriting or blood samples. Furthermore, disclosure of one's name and

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103. 218 U.S. 245 (1910).
104. *Id.* at 252.
105. 384 U.S. 757 (1966).
106. 388 U.S. 218 (1967).
107. 388 U.S. 263 (1967).
108. United States v. Mara, 410 U.S. 19, 36-37 (1973) (Marshall, J., dissenting).
109. 402 U.S. 424 (1971).

address "is an essentially neutral act."[110] The statute merely required evidence of identity, which the Court suggested was "real or physical evidence," even though it was *information*—in contrast to the voice itself in *Wade*—from the mouth of the accused.

Justice Harlan concurred in the judgment on other grounds. In disagreement with the plurality, he argued that self-identification was testimonial.[111] The two dissenting opinions, joined in by a total of four Justices, both vigorously rejected the plurality's view that the disclosures were nontestimonial. Justice Black asked, "[w]hat evidence can possibly be more 'testimonial' than a man's own statement that he is a person who has just been involved in an automobile accident inflicting property damage?"[112] Justice Brennan expressed the same thought by comparing the statute to one requiring all robbers to stop and leave their names and addresses with their victims.[113]

The Court continued to define "testimonial" narrowly when it held in *Fisher v. United States*[114] that the production, in response to a subpoena, of documents written by another was nontestimonial.[115] The Court initially considered two ways in which the production of the documents might be testimonial communication: first, through the contents of the documents, and second, from the actual act of production. The Court reasoned that because the accountant's workpapers were not the taxpayer's, they contained no testimonial declarations by the taxpayer, but instead were analogous to the blood, handwriting, and voice samples previously held admissable.

The Court acknowledged that the act of producing the documents had communicative aspects by conceding the existence of the papers, their possession or control by the taxpayer, and the taxpayer's belief that the papers were those described by the subpoena. Nevertheless, the Court felt the act was not sufficiently testimonial under the cir-

110. *Id.* at 432. The "neutral act" rationale may explain why disclosure is not incriminating, but how does it justify calling the act nontestimonial? Later in the opinion, the plurality clearly discussed the fact that giving one's name was not incriminating (*id.* at 433-34) in the section where it said it would be explaining why it was not testimonial (*id.* at 431).

111. *Id.* at 435-36 (Harlan, J., concurring in the judgment).

112. *Id.* at 462-63 (Black, J., dissenting).

113. *Id.* at 473 (Brennan, J., dissenting).

114. 425 U.S. 391 (1976).

115. Justice Brennan's concurring opinion in *Fisher* questioned the majority's treatment of the act of production as nontestimonial. He asserted that the majority incorrectly had made the protection against self-incrimination turn on the strength of the government's case, denying the right because the government had alternative sources for the information.

Justice Marshall felt the majority's new approach of focusing on the elements of production rather than on the contents of documents would usually lead to the same result. He noted that there would be "a precise inverse relationship between the private nature of the document and the permissibility of assuming its existence." *Id.* at 433 (Marshall, J., concurring). One could assume corporate records existed, but could not make the same assumption for most private papers. When a document's existence could not be assumed, then its production would communicate its existence and be testimonial.

cumstances to receive the protection of the fifth amendment. It stated: "The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."[116]

Although the distinctions are subtle and difficult to draw precisely, the Supreme Court in *Fisher* probably ignored its own warning in *Schmerber* that some methods of obtaining "physical evidence," such as lie detector tests, actually obtain testimonial responses. The act of production possesses the three testimonial aspects listed earlier—the existence, possession, and implied authentication of the papers—even though the documents are "physical evidence," as well.

From a policy standpoint, this narrow view that only "testimonial communications" receive the protection of the fifth amendment presents several dangers.[117] There is the risk of mental and physical coercion, including the techniques used to extract involuntary confessions. In addition, forcing a defendant to condemn himself violates the respect for a person's dignity underlying the fifth amendment right. These dangers, rather minimal in the earlier cases of *Holt* (wearing blouse) and *Schmerber* (blood sample), where only the defendant's passive submission was required, become increasingly significant as greater active cooperation is expected from the defendant. Thus, the "testimonial" limitation on the fifth amendment's protection that allows the government to compel the production of incriminating business records if written by another is highly regrettable from a policy standpoint.

3. *Incrimination*

The Supreme Court has consistently held that the fifth amendment's protection covers only evidence that tends to incriminate. Some Justices have urged that it should also protect human dignity and shield an individual from infamy and disgrace even when there is no possibility of incrimination,[118] but this has always been a minority viewpoint. The issue remains, however, as to how great the danger of self-incrimination must be before one may invoke the fifth amendment.

In *Brown v. Walker*,[119] the Supreme Court upheld an immunity statute against fifth amendment attack, asserting that the "imaginary and unsubstantial character" of the danger of prosecution by another jurisdiction was insufficient to end a person's duty to testify.[120] Rather, the

116. *Id.* at 411.

117. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 265-66 (2d ed. E. Cleary 1972).

118. Ullman v. United States, 350 U.S. 422, 445, 449 (1956) (Douglas, J., dissenting); Brown v. Walker, 161 U.S. 591, 631 (1896) (Field, J., dissenting).

119. 161 U.S. 591 (1896).

120. *Id.* at 608. The two jurisdiction rule was overruled in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

danger must be "real and appreciable" for the fifth amendment right to be applicable.[121] Some commentators have asserted that the "real and appreciable" test is now only a verbal formula no longer strictly applied.[122] Others go further, and maintain that the right is now recognized whenever there is the merest possibility of incrimination.[123] Supporting the latter view, the Supreme Court in *Hoffman v. United States*[124] reversed a criminal contempt conviction for refusal on fifth amendment grounds to answer questions before a federal grand jury. The Court held that the rights applied unless it is " '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate."[125]

As with other issues, however, several recent decisions have narrowed the scope of this aspect of the fifth amendment's protection. In *California v. Byers*,[126] all three California courts that considered the case felt there was a substantial hazard of self-incrimination in the disclosures required by the statute, and that the defendant was actually charged with a criminal violation of the Vehicle Code.[127] However, a United States Supreme Court plurality concluded that "disclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination" required to invoke the fifth amendment's protection.[128] This decision both articulated the standard as "substantial risk," and indicated that the standard would be quite difficult to attain. Because the statute was basically regulatory rather than criminal, the Court was especially reluctant to uphold the fifth amendment claim. However, a person forced to incriminate himself will find little solace in the fact it occurred under a "regulatory" rather than a "criminal" statute. One does not really need the protection of a constitutional right if the government is not interested in doing what the right proscribes. It is precisely when the government wants to regulate a field that the protection of a constitutional right becomes crucial.

Fisher v. United States[129] continued this restrictive trend. The fact that the contents of the papers might be incriminating was irrelevant in the Court's view since the contents were not testimonial communications of the taxpayer. Assuming arguendo that the act of pro-

121. 161 U.S. at 599.

122. *E.g.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 263 (2d ed. E. Cleary 1972).

123. *E.g.*, B. SCHWARTZ, CONSTITUTIONAL LAW 229 (1972).

124. 341 U.S. 479 (1951).

125. *Id.* at 488 (emphasis, and alteration of "answer[s]," in original; citations omitted).

126. 402 U.S. 424 (1971); also discussed in text accompanying notes 109-13 *supra*.

127. *Id.* at 464 (Brennan, J., dissenting).

128. 402 U.S. at 431.

129. 425 U.S. 391 (1976). For a discussion of *Fisher*, see section III.A. *supra*.

ducing the papers did have testimonial significance, the Court noted that it is not illegal to seek accounting help or for the accountant to prepare work papers and deliver them to the taxpayer. Thus, neither the existence of the papers nor their possession by the taxpayer posed a realistic threat of incrimination. Furthermore, the Court asserted that since the taxpayer would not be competent to authenticate the accountant's workpapers, and the documents could not be used in evidence without authenticating testimony, there was no "substantial threat"[130] of self-incrimination in the taxpayer expressing his belief, through production, that the papers were those described in the subpoena.[131]

Fisher's "substantial threat" test is similar to Byers' "substantial risk" formulation. By focusing only on the act of producing the papers and ignoring their contents, the Court precludes the defendants from reaching the standard.

In both *Fisher* and *Byers*, the Court divided the arguably incriminating situations into component parts, then considered each component separately in determining whether "incrimination" might occur. Furthermore, the same component had to be both "testimonial" and "incriminating" for the majority to hold the fifth amendment right applicable. In *Fisher*, four components were present: (1) the contents of the documents; (2) their existence; (3) their possession by the taxpayer; and (4) their implied authentication. None of these components met both the "testimonial" and "incriminating" tests. One might almost infer that a clear confession would not be incriminating because each word, by itself, is innocuous. This approach is unrealistic. A prosecutor would use all incriminating components in his case, and the defendant would be convicted by their combined effect. The Court should look at a situation in its totality in determining whether or not it is incriminating.

At times the fifth amendment may be in conflict with other interests of society, including the need to prosecute criminals and the need to protect the civil interests of victims. These conflicts, however, may frequently be reconciled through the use of immunity statutes, which permit the state to compel the testimony of one participant in a criminal activity in order to convict the others. Similarly, when the state interest is civil recovery by the victim, as in *Byers*, a grant of immunity from criminal prosecution protects both the victim's pecuniary interest and the defendant's fifth amendment right.[132] In either case, the one

130. *Id.* at 413.

131. Justice Brennan argued that the taxpayer's implicit authentication of the papers through their production did pose a substantial threat of self-incrimination. Again, he felt the majority was improperly denying the right merely because the government had alternative methods of authentication.

132. California v. Byers, 402 U.S. 424, 463-64 (1971) (Black, J., dissenting).

granted immunity may be prosecuted by completely independent evidence, with the burden of proof as to its independence on the prosecution.[133] The narrow view of the fifth amendment is not, therefore, necessary to protect the interests of society.

C. *The Broad View*

Proponents of the broad view of the fifth amendment rely on the common law to explain its meaning, rather than on an interpretation of the amendment's literal words. They emphasize the policy of protecting the individual from government interference more than do those holding the narrow view. This expansive interpretation has generally commanded only a minority of the Supreme Court.

The conflict between the broad and narrow views first surfaced on the issue of immunity statutes. In *Brown v. Walker*,[134] the majority upheld a statute requiring a witness to give incriminating testimony upon a grant of immunity. Four justices dissented, stating the fifth amendment gave absolute protection that could not be changed by acts of Congress.[135] Justice Field argued that all constitutional provisions securing rights or privileges to the citizen should be construed liberally for the widest effect.[136] In particular, he argued, the fifth amendment springs from regard for "personal self-respect, liberty, independence, and dignity,"[137] and includes protection from testimony leading to infamy and disgrace even if it is not incriminating.[138] When the same issue arose more recently,[139] Justice Douglas contended that the amendment protected individual conscience and human dignity from government compulsion[140]—as well as safety and security.

One case where the majority of the Supreme Court recognized the values supporting the broad view of the fifth amendment, at least in dicta, was *Murphy v. Waterfront Commission*.[141] The Court listed many of the "fundamental values and most noble aspirations" reflected in the right, including "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' "[142] Seldom has the majority so clearly recognized the protection of privacy as part of the fifth amendment. The case's holding, however, that the fifth amendment protects a state

133. Kastigar v. United States, 406 U.S. 441 (1972).
134. 161 U.S. 591 (1896). *See* note 81 *supra*.
135. *Id.* at 610 (Shiras, J., dissenting) and 630 (Field, J., dissenting).
136. *Id.* at 631 (Field, J., dissenting).
137. *Id.* at 632 (quoting counsel; emphasis omitted).
138. *Id.* at 631 (Field, J., dissenting).
139. Ullman v. United States, 350 U.S. 422 (1956).
140. *Id.* at 445, 449 (Douglas, J., dissenting).
141. 378 U.S. 52 (1964). *See also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
142. 378 U.S. at 55.

witness against self-incrimination under federal law, and vice versa, could easily have been reached under the narrow view of the amendment. It was merely a recognition that the circumstances presented a "real and appreciable"[143] threat of self-incrimination.

In the cases where the majority developed its "testimonial" limit to the fifth amendment, the usual dichotomy on the court reappeared. In *Schmerber v. California*,[144] the majority upheld the taking of a blood sample from the defendant over his objection. Justice Black complained in his dissent of the imprecision of the word "testimonial," adopted from Wigmore, who favored keeping the fifth amendment right "within limits the strictest possible."[145] Justice Douglas also reminded the Court of the fifth amendment zone of privacy it had recognized in *Griswold v. Connecticut*.[146]

In *United States v. Wade*,[147] the Court upheld as nontestimonial a requirement that a defendant speak in a lineup. The dissenters again protested that there were additional values historically protected by the amendment, which the majority should have considered. Justice Fortas pointed out the importance of the amendment to the balance between the rights of the individual and those of the state.[148] The roots of the amendment, he felt, went deeper than opposition to the use of torture to coerce confessions. He argued that the fifth amendment went directly "to the nature of a free man and to his relationship to the state."[149] In a similar case involving handwriting exemplars, Justice Marshall noted in dissent that the testimonial limitation ignored the amendment's purpose of preserving "the inviolability of the human personality" since it allows officials to enlist an individual's will in incriminating himself.[150]

The recent business records cases have continued to reflect this split in the Court. Although Justice Brennan concurred in the judgment in *Fisher v. United States*,[151] he expressed concern at the majority's derogation of the fifth amendment's role as a protector of privacy. He explained at length that an individual's books and papers are extensions of his person, and that people should have the freedom to think private thoughts as facilitated by pen and paper.[152] He would protect books

143. *See* text accompanying notes 119-21 *supra*.

144. 384 U.S. 757 (1966).

145. *Id.* at 774 (Black, J., dissenting).

146. *Id.* at 778 (Douglas, J., dissenting). *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

147. 388 U.S. 218 (1967).

148. *Id.* at 262 (Fortas, J., dissenting in part).

149. *Id.* at 261 (Fortas, J., dissenting in part).

150. United States v. Mara, 410 U.S. 19, 33, 35 (1973) (Marshall, J., dissenting) (citation omitted).

151. 425 U.S. 391 (1976).

152. *Id.* at 420 (Brennan, J., concurring in the judgment).

and papers in a "zone of privacy," which he extensively defined, from compulsory production.[153] Justice Brennan noted the difficulty of determining whether or not business records were private papers. Acquiescing in the holdings of prior cases, he concluded that generally the records of business entities were not private, while those of the unincorporated sole proprietor were.[154] He apparently did not consider the *Fisher* records private, however, because they had originated with the independent accountant rather than with the sole proprietor. Although one criterion of Brennan's "zone" was whether or not the information had been disclosed to a third party,[155] Justice Douglas had earlier contended that giving records to one person (an accountant) for one purpose (completing tax returns) did not commit them to the public domain.[156]

In *Andresen v. Maryland*,[157] Brennan lamented that the majority had confined the dominion of privacy to the mind and was denying the individual "a zone of physical freedom necessary for conducting one's affairs."[158] Relying on prior cases holding the fifth amendment right to apply to the business records of a sole proprietor, he found the records involved in *Andresen* to be within the zone of privacy protected by the amendment. He felt the majority ignored the "essential spirit" of the amendment by not protecting the "private zone comprising the mere physical extensions of an individual's thoughts and knowledge,"[159] including business records.

The broad view of the fifth amendment, as presently interpreted, does not include all business records within the amendment's protection. It focuses on whether or not a person had a "reasonable expectation of privacy"[160] concerning the documents involved. By this criterion, the records of business entities would generally not be protected, while those of a sole proprietor would generally receive the amendment's protection. Thus, this view shields more business records than does the narrow view.

The historical background leading up to the adoption of the fifth amendment supports the broad view of the amendment rather than the narrow view. According to Leonard Levy, author of the definitive history of the amendment, "its framers meant to bequeath a large

153. *Id.* at 424-28.

154. *Id.* at 426-27.

155. *Id.* at 425.

156. Couch v. United States, 409 U.S. 322, 340 (1973) (Douglas, J., dissenting). *See also* Moskovitz v. Hynes, 48 App. Div. 2d 804, 369 N.Y.S.2d 451 (1975) (petitioner, who had turned records over to United States Senate subcommittee, could still claim his fifth amendment rights concerning them when they were subpoenaed by the Attorney General).

157. 427 U.S. 463 (1976).

158. *Id.* at 487 (Brennan, J., dissenting).

159. *Id.* at 486 (Brennan, J., dissenting).

160. Fisher v. United States, 425 U.S. 391, 424 (1976) (Brennan, J., concurring in the judgment).

and still-growing principle."[161] Some of the positions taken by the Supreme Court Justices holding the broad view, such as their opposition to immunity statutes,[162] are questionable in that they are unsupported by the preconstitutional history[163] and are contrary to strong countervailing policy considerations. In general, however, the broad view better reflects the spirit and policy behind the fifth amendment right against self-incrimination.[164]

V. CONCLUSION

As many of the foregoing cases illustrate, in the field of business records the Supreme Court apparently regards the constitutional *right* against self-incrimination as a mere common law *privilege*, to be balanced and frequently superseded by countervailing factors. This treatment of the right ignores the historic reason for and function of the Bill of Rights as limiting the otherwise unrestricted power of government.[165] The Court's use of the term "privilege"[166] instead of the term "right" is a telling indication of its attitude.[167]

Levy, writing about the Court's "ever-widening, liberal interpretation" of the fifth amendment generally [unlike its more restrictive view when business records are involved] observed that "[i]n effect the Court has taken the position that the Fifth embodied the still evolving common law of the matter, rather than a precise rule of fixed meaning."[168] This evolution may be defensible when it is used to expand a constitutional right over time, but not when it is used to narrow a right. The Bill of Rights was not intended to aid prosecutorial efficiency, speed, convenience, or the revelation of truth. Instead, it embodied a judgment that the determination of guilt or innocence should be made without the accused making an unwilling contribution to his own conviction.[169] The Constitution is of course subject to interpretation, but courts should regard it as a more permanent characterization of governmental powers and limitations than are common law principles which more appropriately change over time.

Before the 1975 Supreme Court Term, the fifth amendment right

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161. L. LEVY, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS 265, 275 (1972).

162. *See* text accompanying notes 134-40 *supra.*

163. L. LEVY, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS 265, 276 (1972).

164. *Id.* at 274.

165. *See* L. LEVY, AGAINST THE LAW 171 (1974).

166. *See, e.g.*, Andresen v. Maryland, 427 U.S. 463, 475 (1976); Fisher v. United States, 425 U.S. 391, 402 (1976).

167. *See* note 1 *supra.*

168. L. LEVY, *The Right Against Self-Incrimination: History and Judicial History*, in JUDGMENTS 265, 274 (1972).

169. L. LEVY, AGAINST THE LAW 145 (1974).

against self-incrimination was inapplicable to the following records: those of corporations and unincorporated associations; those of bankrupts; required records; and instrumentalities, fruits, and contraband of crime. Since then, the Supreme Court has also excepted accountants' workpapers currently held by the taxpayer who was compelled to produce them in *Fisher*, and handwritten notes by and in the possession of a sole proprietor when they were obtained by search warrant rather than by subpoena in *Andresen*. Apparently, the only business records still protected by the fifth amendment are those of a sole proprietor that do not fall within any of the exceptions for bankrupt's records, required records, or instrumentalities, fruits, and contraband of crime. Additionally, the records must not have been written by another, and must be so secret that a search warrant cannot describe them with constitutional specificity. The Supreme Court has treated this fifth amendment constitutional right like a mere common law privilege to the point of virtually abolishing it. The businessman who can keep all his records mentally still has a secure fifth amendment right. Others must struggle to fit into an ever-narrowing protected zone.

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